Ontario

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF a complaint by Aslam Ahmed dated December 29, 1989 alleging discrimination in accommodation because of citizenship and place of origin;

B E T W E E N:

Ontario Human Rights Commission

-and-

Aslam Ahmed

Complainant

-and-

177061 Canada Ltd. o/a Shelter Canadian Properties Limited

Respondent

DECISION

Adjudicator:	Mary Anne McKellar
Date:	May 2, 2002
Board File No.:	BI-0152-98
Decision No.:	02-007

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	William Holder, Counsel
	)	
Aslam Ahmed, *Complainant*	)	Leilani Farha, Counsel and Bruce Porter
	)	
177061 Canada Ltd., *Corporate Respondent*	)	Jenny Stephenson, Counsel

INTRODUCTION

By complaint dated December 29, 1989, the Complainant, Aslam Ahmed, alleged that the Respondent, Shelter Corporation of Canada Ltd., had discriminated against him on the basis of his citizenship and place of origin by rejecting his application for rental accommodation for failure to satisfy minimum income, work history, and credit history criteria, contrary to the provisions of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*"). Pursuant to the agreement of the parties, the Board hereby amends the Complaint to reflect the correct name of the Respondent, 177061 Canada Ltd. o/a Shelter Canadian Properties Limited ("Shelter").

This Complaint was referred to the Board by the Ontario Human Rights Commission in 1998. On the agreement of all the parties, it was adjourned pending the release of the Board's decision in *Kearney et al. v. Bramalea et al.* (1998), 34 C.H.R.R. D/1 ("*Kearney*"). One of the complaints considered in *Kearney* related to the complainant J.L.'s application in June 1990 for tenancy in a building owned by Shelter. J.L.'s application was subject to the same tenant selection criteria as that of the Complainant in this case. *Kearney* was released on December 22, 1998, and a Notice of Appeal filed in respect of it on January 20, 1999. This Complaint was subsequently set down for hearing in February and March 2000, but then adjourned on the consent of all the parties. Following a series of conference calls in the fall of 2000, the hearing commenced on December 6, 2000. At that time the parties led evidence in accordance with the following agreement set out in paragraph 5 of the Memorandum of Conference Call dated November 1, 2000:

> The parties have agreed that all parties will lead their evidence tending to establish the adjudicative facts at issue in this complaint at the hearing scheduled for December 6, 2000. The Complainant and the Commission have indicated an intention to elicit testimony from the Complainant and his wife. The Respondent has indicated an intention to elicit testimony from its rental agent, property manager and regional manager. In accordance with normal practice, those witnesses may be recalled if necessary at a later stage of the proceeding to testify in respect of any new issues that subsequently arise.

Following the conclusion of the hearing into the adjudicative facts, the parties entered into discussions in an attempt to reach agreement on the scope of any further evidence to be adduced before the Board. During the course of these discussions, on February 1, 2001, the Divisional Court released *Shelter Corporation v. Ontario (Human Rights Commission)*, [2001] O.J. No. 297 ("the *Kearney Appeal*"), allowing in part the appeal of *Kearney*. The parties ultimately agreed in June 2001 that the Board could receive the reports of three experts qualified by the Board in the *Kearney* case, as well as transcripts of their testimony in that proceeding. Those witnesses are Gary McIlravey, Professor Neil Ornstein, and Professor David Hulchanski, and electronic copies of the documents were provided to the Board in September 2001. The Complainant also sought to qualify two additional witnesses as experts to offer opinion evidence: Professor Saul Schwartz and Julia Chao. Hearing dates were scheduled in mid-November 2001 for the purpose of dealing with these witnesses and hearing the final submissions of the parties.

ISSUES

There are two issues in this case: whether the refusal of the Complainant's application for tenancy based on Shelter's tenant selection criteria constituted discrimination against him on the basis of his citizenship and place of origin contrary to the *Code*; and if so, whether subsection 21(3) of the *Code* and O.Reg. 290/98 nevertheless operate to permit the continued use of those criteria, such that the Board is precluded from making an order restricting their use.

DECISION

The Board finds that Shelter's rejection of the Complainant's application for tenancy based on its tenant selection criteria did constitute discrimination against the Complainant on the basis of his citizenship and place of origin contrary to the *Code*. The Board further finds that subsection 21(3) of the *Code* and O.Reg. 290/98 does not

preclude it from making an order restricting the continued application of those tenant selection criteria to newcomers to Canada.

ADJUDICATIVE FACTS

The Board heard *viva voce* testimony from the following witnesses with respect to the adjudicative facts: the Complainant, Carol Armit, Pearl Vallee and Gerry Gonsalves. Very few facts are in dispute as a result of that testimony, and in the Board's view, having regard both to the concessions made by Shelter and the effect of the *Kearney Appeal*, it is not necessary to resolve the disputes that remain.

The Complainant was born in 1952. He received a B.Comm. degree from the University of Dhaka in Bangladesh, and subsequently lived and worked as an accountant in England for some time in the mid-80's, where he and his wife owned residential property. The Complainant's wife, Christine Ahmed, also worked as an assistant to the Headmaster of a French language school in England. The Complainant and his wife subsequently returned to Bangladesh to attend to family matters. They had one child when they commenced efforts in 1987 to emigrate to Canada from Bangladesh. It took approximately 1 1/2 years for the Ahmed family to become landed immigrants. The Complainant, his wife, and daughter finally arrived in Canada on September 9, 1989. They held Bangladeshi citizenship at the time.

The Ahmed family initially stayed in the Mississauga residence of one of the Complainant's former classmates, Shams Khan. The Ahmed family occupied one bedroom in the home. By October 10, 1989, the Complainant's daughter had started school, he had obtained his driver's license, and Christine Ahmed had secured employment as a bilingual secretary at an annual salary of $28,000. At this point they commenced searching for rental accommodation. The Complainant testified that the family had held off searching for an apartment until after one of the parents had a job in order to avoid depleting their savings, which amounted to at least $25,000 at that time.

After a couple of weeks of searching for an apartment, primarily by means of driving around and looking for "vacancy signs", the Complainant noticed such a sign on a building owned by Shelter at 2747 Battleford Road in Mississauga. Carol Armit was a rental agent for Shelter. She was working in the building at the time, and she showed the Complainant a vacant two-bedroom unit that was renting for $879 per month. The Complainant liked the unit, and he was provided with an application form. Among other information, this application sought "credit" information. The Complainant asked Ms. Armit what this meant, and when he indicated that he had no credit cards, she advised him to leave the section blank.

A copy of the rental application completed by the Complainant was filed with the Board. The Board notes that the blank application is identical to the one completed by the complainant J.L. and considered in *Kearney*. In the Complainant's application, he indicates under "Present Landlord's Name" that the family was staying with friends temporarily. Under "Previous Landlord's Name", the Complainant has written "House Owner". Accurate information respecting the name and address of Christine Ahmed's employer, and the title of her position, length of employment and salary, was also indicated on the application. With respect to "Spouse's Employer and Occupation", the application indicates that the Complainant is an accountant seeking employment. Under the section headed "References", the Complainant identified his branch of the CIBC, but left the sections headed "Credit" blank. The Complainant testified that he provided this completed application, along with a certified cheque representing two month's rent, to Ms. Armit on October 26, 1989.

The Complainant further testified that he advised Ms. Armit that he would have no trouble meeting the rental obligations because he had $25,000 in savings. He did not recall if he explained to her that he had no credit cards because they were not commonly in use in Bangladesh, nor in England while he lived there. In any event, the Complainant testified that he was very confident that the rental application would be successful, because Ms. Armit had told him that his wife's income was "more than sufficient". On the strength of this assurance, the Complainant told the Khans that the family would be

moving out of their house, and he purchased almost $2000 worth of furniture on October 27, 1989, specifying that it should be delivered to 2757 Battleford Road. The Complainant stated that he was expecting to move in on November 1, 1989.

On October 30, 1989, the Complainant attended at the rental office and spoke to Ms. Armit. He had attended in order to obtain the keys, but he indicated that she advised him that there had been a delay and he could not have them yet, but "not to worry". According to the Complainant, Ms. Armit advised him to come back the following day. When the Complainant contacted her on October 31, 1989, Ms. Armit told him that the rental application had been turned down. The Complainant then asked to speak to the manager and was provided with a phone number. He called the number and spoke to the property manager, who was subsequently identified to the Board as Pearl Vallee.

According to the Complainant, Ms. Vallee told him that his application had been rejected because he lacked a credit rating, and because of insufficient income. He testified that he advised Ms. Vallee that he had no credit rating because he was new to Canada, but that he had $25,000 in savings. His Complaint also indicates that the Complainant told Ms. Vallee that Ms. Armit had said that Christine Ahmed's employment income was more than sufficient, but that Ms. Vallee said that Ms. Armit was only a rental agent and lacked the authority to make such a statement.

Following his conversation with Ms. Vallee, the Complainant contacted Ms. Armit again, and asked for the phone number of Shelter's Head Office. He was provided with the phone number of Gerry Gonsalves. When the Complainant contacted Mr. Gonsalves, he promised to look into the matter. The Complainant told that Board that at this time he even offered to have Mr. Khan co-sign the rental application, and he recalled putting Mr. Khan on the phone to speak to Mr. Gonsalves. This information is not reflected in the Complaint, nor did Mr. Khan testify before the Board. The Complainant also recalled telling Mr. Gonsalves that he had $25,000 in the bank, although this is not reflected in the Complaint. Mr. Gonsalves called the Complainant back the next morning and advised that he stood by the property manager's decision, pointing out that

Shelter did not know the Complainant, he was new in the country, and he had no credit rating. The Complainant testified that he did not argue with Mr. Gonsalves, because all he wanted to do was secure accommodation.

The Complainant recovered his certified cheque from Shelter's rental office and asked for the delivery of his furniture to be postponed. He then viewed an apartment in a nearby building. The Complainant applied for that unit, which rented for $825 per month, and explained that he and his family were newcomers to Canada, that he had no credit rating, but that he did have money in the bank. The Complainant obtained that unit, moved in on November 7, 1989, and testified that he had never been in default on the rent, or indeed on any other payment. The Complainant purchased a town home in December 1990, and then a house in late 2000. He obtained Canadian citizenship in 1993.

Ms. Armit testified that by the time the Complainant sought to rent an apartment, she had already been working for 2-3 years as a rental agent under contract with Shelter. Her duties involved answering telephone inquiries, showing apartments to persons who made appointments and those who walked in, accepting applications and assisting applicants to complete them, performing credit cheques and forwarding applications to the property manager, Ms. Vallee. Although she did not have authority to approve rental applications, Ms. Armit was aware of the guidelines applied to their assessment and informed prospective tenants, including the Complainant, of them. She identified those guidelines as follows: rent should not exceed 36% of income; incomes could not be combined; good rental references; good credit; and a gainful means of employment. Ms. Armit testified that, in her view, "gainful means of employment" meant that the applicant had a steady job. She was not aware that any specific employment tenure was desirable. "Good rental references" in her view, meant that the applicant had a history of paying rent on time and was "not known to trash the place", but she could not testify as to how rental references were assessed as good or not because the property manager performed those checks. Although Ms. Armit polled the computer for a credit check, she did not know how to read the results, and merely stapled the report to the application and

forwarded those documents to the property manager. Ms. Armit's evidence was that she understood all of the guidelines to be discretionary and that she so advised the Complainant.

Ms. Armit recalled being made aware of the fact that the Complainant was a newcomer to Canada and that he had $25,000 in the bank. She also recalled advising him that no having credit or rental references was better than having bad ones. Ms. Armit was very clear, however, that she would not have told the Complainant that he would get the apartment, because that was not her decision to make, although she might have indicated her sense that his financial qualifications looked good. Ms. Armit recalled telling Ms. Vallee that the Complainant had $25,000 in the bank. She also stated that she would have interpreted the rental application as indicating that the Complainant had no rental history because he had previously owned his own home.

Ms. Vallee testified that she worked as a property manager for Shelter for seven years, commencing in 1985. One of her responsibilities was to review and approve or reject rental applications forwarded to her by rental agents. She testified that her decision to approve or reject an application was based on the result of credit, employment and landlord checks, and whether the rent for the unit exceeded 30-36% of the applicant's income. Ms. Vallee recalled that the above factors could be applied in a discretionary fashion, so that an applicant with lower income, but a good credit reference or substantial savings might be accepted. She testified that Shelter did not normally ask for bank statements, but that it would do so if an applicant's income was insufficient and he or she supplied information about a bank account. Where that occurred, she testified that she did not approve the application herself, but passed it along to Mr. Gonsalves for approval or rejection. Ms. Vallee also indicated that Shelter accepted co-signors where they completed the rental application and all the employment and credit checks on them were satisfactory. She did not recall if a written policy on tenant selection criteria existed in 1989.

Subsequent to hearing the testimony of Ms. Armit, Ms. Vallee, and Mr. Gonsalves, Mr. Gonsalves provided the Board with an affidavit to which he appended a copy of Shelter's "Criteria for Accepting Applicants for Tenancy", effective April 1, 1980 until November 30, 1990. This document specified that rent should not exceed 30% of a prospective tenant's gross annual income, but Mr. Gonsalves deposed that he understood that this criterion had always been applied in a flexible manner. This policy also made reference to the need for ascertaining from an applicant's employer that they were not intending to transfer or lay-off the applicant during the term of the lease. Although this document does not specifically refer to landlord checks, it does mandate that a property manager ascertain whether the applicant's attitude or behaviour might be a disruptive imposition on other tenants, and refers to a more detailed procedure for checking the tenant's application and determining whether to accept or reject it.

With respect to the Complainant's rental application, Ms. Vallee testified that neither Ms. Armit nor the Complainant told her that he had $25,000 in savings, or else she would have obtained a copy of his bank statement and forwarded the application to Mr. Gonsalves in accordance with her usual practice. Instead, she rejected his application. The copy of that application filed with the Board bears the following notation, in Ms. Vallee's handwriting: "declined Oct. 31/89, insufficient income, insufficient employment record, insufficient landlord check". In her cross-examination, Ms. Vallee agreed with the suggestion that the application was also rejected for a failed credit check, saying "that's right – there wasn't one". Ms. Vallee herself did not make the telephone calls to perform the landlord and employment checks. Those calls were made by her secretary and the information recorded on a form attached to the application.

Ms. Vallee explained that Christine Ahmed's employment history was insufficient because she had only been working for two weeks at the time of the application, and a minimum of three months employment tenure was required by Shelter. She acknowledged that she only looked at employment history in Canada. Similarly, she acknowledged that Shelter only ever checked with landlords within Canada to ascertain if an applicant had been a good tenant. Ms. Vallee described the purpose of the landlord

check as being to verify that an applicant's rent was paid on time, that there was no problem with noise, and that he did not cause problems with other tenants. With respect to the credit check, she indicated that the purpose was to determine that the applicant did not have a bad credit rating. While she admitted that these sources of information would be missing for newcomers to Canada, she testified that she did not know the Complainant was a newcomer because she did not look at his previous address information on the application. She also testified that even had she known he was a newcomer, the only fact that might have warranted treating his application differently would have been information about the Complainant's savings.

Ms. Vallee testified that she did not recall talking to Mr. Gonsalves about the Complainant's application, although she agreed that he was the one she would normally appeal to about exercising flexibility with respect to the tenant selection criteria. Effective November 30, 1990, the "Criteria for Accepting Applications for Tenancy" was revised. This version of the policy provides examples of some alternative kinds of information that property managers might consider in assessing applications for tenancy, including the existence of financial resources other than annual salary. The policy also indicates that an assessment of financial status based on information from financial institutions is more reliable than credit information. This policy was not in effect at the time of the Complainant's rental application, and Ms. Vallee admitted that she did not consider looking at any of the kinds of alternative information listed there before rejecting the application.

Mr. Gonsalves testified that he was regional manager with Shelter in October, 1989. His responsibilities included supervising the operations of all properties owned by Shelter in Southwestern Ontario, including the hiring, training and supervising of all property managers. He stated that the property manager responsible for a particular site normally decides whether to approve rental applications, but that he was occasionally consulted if a property manager needed guidance with respect to an applicant who did not meet the strict guidelines. Although property managers could exercise some discretion with respect to the application of the guidelines, Mr. Gonsalves testified that they would

still approach him if they were not comfortable making those decisions on their own, but that that would probably occur only 5-6 times per month.

Mr. Gonsalves recalled receiving a telephone call from the Complainant, who wanted his rental application reviewed because he did not think it should have been rejected. Although Mr. Gonsalves could not recall exactly what he did to investigate the matter, he indicated to the Board that his normal practice would have been to review the application and speak to the property manager about why it was rejected. He confirmed that he told the Complainant that the property manager appeared to have made the right decision based on the information provided. Mr. Gonsalves told the Board that the Complainant's income was low, and discretion could not be exercised in his favour because the application provided no other information to go on. He further stated that Shelter's practice at the time was not to be proactive in eliciting information about other funds an applicant might have, or in seeking out co-signors. Mr. Gonsalves further testified that he was not aware that the Complainant had $25,000 in savings, and that he would have approved the application had he known that fact. He did not recall having a conversation with Mr. Khan, nor did he recall that the Complainant offered to obtain a co-signor.

In cross-examination, Mr. Gonsalves was asked if he was sure he reviewed the Complainant's application, and he stated, "I am sure I would have. That was my practice. The property manager's office was within walking distance of my own." He also agreed that the Complainant's application was turned down for a lack of information, and that the reason that that information was lacking was because the Complainant was a newcomer to Canada. In those circumstances, Mr. Gonsalves agreed that it would have been a good idea to make more inquiries of newcomers in assessing their applications because they present a different profile from that of other applicants. With respect to the four rental criteria considered, income, credit references, landlord references, and employment history, Mr. Gonsalves agreed that the majority of successful applicants satisfied all four criteria, while the majority of unsuccessful applicants failed one, but that in exceptional circumstances, some other factor might permit an applicant to overcome a

failing criterion. He also agreed that Shelter had no policy indicating how the various factors were to be weighed, and that he did not know how the individual property managers weighed them in practice.

As the Board has outlined the witnesses' testimony above, it appears that the only factual matters in dispute are whether Ms. Vallee and Mr. Gonsalves knew about the Complainant's savings, and whether Mr. Khan offered to co-sign the lease. Having regard to the fact that Ms. Armit knew about the Complainant's savings, and to Shelter's concession that the Complainant's application should not have been refused, neither dispute needs to be resolved.

EXPERT EVIDENCE

(i) **Expert Evidence Admitted on Consent**

As noted above, the parties consented to the Board admitting the evidence adduced in *Kearney* through three witnesses called by the Commission and qualified as experts to give opinion evidence in that proceeding, without the necessity of their testifying in this proceeding. They are David Hulchanski, Michael Ornstein and Gary McIlravey. Shelter further agreed to be bound by the *Kearney* panel's findings with respect to their evidence. To the extent necessary, those findings are set out below under the heading "Analysis".

(ii) **Julia Chao**

The Complainant sought to qualify Julia Chao as an expert, as indicated in counsel's letter to the Board dated October 1, 2001:

> Ms. Julia Chao will be qualified as an expert in the housing experiences of newcomers to Canada and the effect of landlords' credit requirements on newcomers' access to rental housing.

Ms. Chao testified with respect to her qualifications to proffer opinion evidence in the above areas to the Board. At the conclusion of that testimony, Shelter objected to the introduction of that evidence. The Board ruled orally that the proposed testimony would not be admitted and indicated that written reasons for that decision would be included in its final decision in this matter. The following paragraphs comprise those reasons.

Ms. Chao possesses a B.A. from the University of Toronto, and a B.S.W. and M.S.W. from York University. Her academic research involved an examination of the barriers faced by 89 Ghanaian immigrant households in obtaining private rental housing in Toronto. In addition to her academic work in the area of housing immigrant families, Ms. Chao worked as a Housing Programme Worker at COSTI in North York from December 1993 until October 2001. COSTI is Canada's largest non-profit organization with a specific mandate to provide services to newcomers, immigrants and their families. COSTI offers many forms of assistance to this clientele, including interpretation/translation services, citizenship classes, womens' programs, a vocational centre, advocacy and public education, and housing help. The Housing Help Programme is a community-based program offering assistance to persons seeking accommodation in the private rental sector, and to those seeking to access public housing. In addition, the Housing Help Programme maintains a registry of landlords with vacant apartments. In the year 2000, there were approximately 240 landlords registered with COSTI.

Ms. Chao's own responsibilities as a Housing Programme Worker included working with individual families or housing seekers to assess their housing needs and the kind of assistance they might require in securing that housing, as well as offering supportive counselling. She also engaged in landlord recruitment and outreach. In the year 2000, Ms. Chao and two other Housing Programme Workers dealt with 1500 clients seeking housing. She estimated that she would have dealt with about 500 housing seekers, approximately 47% of whom were newcomers to Canada. For these purposes, she defined "newcomer" as someone who had been in Canada for three years or less. Those newcomers arrived in Canada from over 100 different countries, but primarily from Asia, and less frequently from Europe and Africa. Ms. Chao testified that if she

were contacted by a newcomer seeking housing, her normal practice would be to have that client attend for an interview, part of which would involve her educating the newcomer about various topics: the rental market in Toronto; the rights and obligations of landlords and tenants; and how to conduct an effective housing search. She would also assess the housing needs of the client, and might refer the client to a landlord registered with COSTI, but would encourage the client to make the direct contact with the landlord him or herself. As part of COSTI's funding requirements, it is obliged to follow up with clients to determine how they have fared with landlords. Ms. Chao indicated that she would normally have done so by telephone or in-person interview.

In her examination by the Commission, Ms. Chao was asked how frequently she had encountered the issue of landlords imposing credit requirements on her clients. She responded that during feedback sessions her clients often indicated that they had been asked questions about their income and its source and the availability to them of credit. Ms. Chao also indicated that before registering a landlord, COSTI ascertains what tenant selection criteria will be used, and further stated that COSTI would challenge the use of any that it felt contravened the law or demonstrated the landlord's unwillingness to rent to persons from a particular category. She did not address the issue of whether COSTI had in fact challenged such landlords with respect to the use of credit criteria.

In cross-examination by Shelter's counsel, Ms. Chao was asked whether she had studied the impact of landlords' requirement of credit references during the course of her employment or academic research. She advised that her questioning of both her clients and her research subjects had been open-ended and aimed at ascertaining the range of barriers to housing. Ms. Chao stated that she could not testify with respect to how often criteria respecting credit references were a factor in the failure of her clients or research subjects to secure housing. While she indicated that COSTI maintains statistics organized in ten broad categories about the barriers its clients face in obtaining housing, "credit information" is not one of those categories. Instead, where credit was viewed as a relevant factor, it might be entered in COSTI's statistical database under "income level", "co-signor" or "first and last month's rent", or it might merely be noted in the client file.

Ms. Chao herself had never polled COSTI's database in an attempt to ascertain how frequently credit issues created a barrier to clients' obtaining housing. Although she had reviewed the literature respecting income as a barrier to obtaining housing, Ms. Chao could not recall reviewing any literature that dealt specifically with the subject of credit references as a barrier. Shelter's counsel put to her that she was being proffered as an expert with respect to credit, and Ms. Chao replied:

> That's not my understanding. I am to testify about my experience with immigrant housing seekers, not with respect to any particular barrier. I am not an expert on the impact of credit checks. I wouldn't claim to be an expert.

Four criteria guide a decision maker in the determination of whether to admit opinion evidence in a proceeding. Those criteria are set out as follows by the Supreme Court of Canada in *R. v. Mohan* (1994), 89 C.C.C. 402, at p.411:

(a) relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule; and
(d) a properly qualified expert.

Shelter objected to the admissibility of Ms. Chao's proposed evidence on the basis that it did not satisfy criteria (b) and (d). With respect to criterion (b), Shelter submitted that the evidence proffered must be evidence outside the normal experience of the trier of fact, such that a person would be unlikely to form a correct opinion of it unassisted by an expert. With respect to criterion (d), Shelter submitted that the proffered evidence must not be merely anecdotal or impressionistic and based on personal experience, but must instead have an objective foundation based on verifiable data.

The Complainant's counsel submitted that the housing experiences of newcomers are outside the ordinary knowledge of the Board, and Ms. Chao's evidence would therefore be of assistance. She further noted that Ms. Chao would be able to testify with respect to the behavioural characteristics of newcomers that make them particularly unlikely to default on their housing costs. With respect to Ms. Chao's qualifications to offer opinion evidence, counsel asserted that in many other cases the Board has

entertained opinion testimony from persons with experience dealing with particular communities, and that much of that evidence has been qualitative rather than quantitative.

While the Board agrees that the housing experiences of newcomers are outside the knowledge of the Board, the range of those housing experiences does not appear to be relevant to the issues in dispute in this hearing. For example, newcomers may face linguistic barriers in accessing housing, but those barriers are not pertinent to this proceeding. The only pertinent barrier is the impact of credit references on newcomers such as the Complainant. Ms. Chao candidly admitted that she is not an expert in this area.

Given the uncontradicted evidence of the Complainant that credit cards are not widely used in the countries he lived in before emigrating to Canada, and the evidence of Ms. Vallee that Shelter does not perform credit checks outside Canada in any event, it seems to the Board that it is certainly open to it to conclude that such checks will disparately impact newcomers as compared to other groups of rental applicants. Furthermore, Shelter's counsel agreed to be bound by the *obiter* statement in *Kearney* to the effect that rejecting a tenancy application on the basis of no credit reference is different from rejecting such application on the basis of a bad credit reference. With respect to the likelihood of newcomers defaulting on their rental payments, the Complainant did not propose to call Ms. Chao as a witness who would offer opinion evidence in that area, and she was not examined or cross-examined with respect to her qualifications to provide that testimony, although there was reference made to this subject matter in her report. In any event, the Board also notes that any evidence respecting risk of default by newcomer tenants is germane to the existence of a reasonable justification for Shelter's tenant selection criteria as applied to newcomers. In the absence of any proffered evidence by Shelter to establish that justification, there is no utility in the Board hearing evidence in rebuttal.

(iii) **Saul Schwartz**

By letter dated October 1, 2001, the Complainant indicated the following with respect to its intention to elicit opinion evidence from Professor Saul Schwartz:

> Prof. Saul Schwartz will be qualified as an expert in the economics of loan default, qualified to provide opinion evidence about the relationship between the non-existence of a credit rating and the risk of default on consumer credit and to comment on the availability of any published analyses on the relationship between the non-existence of a credit rating and rental default.

Prof. Schwartz received his Ph.D. in economics from the University of Wisconsin in 1981, and has been continuously employed since that time in an academic teaching capacity, first in the Department of Economics at Tufts University until 1991, and thereafter at Carleton University as an Associate Professor in the School of Public Policy and Administration. His primary research interests focus on three areas: the economics of income transfer programs; education finance, particularly issues surrounding the provision of direct financial aid to students; and financial services to the poor and personal bankruptcy. He teaches both microeconomics theory and statistics and econometrics classes to students at the graduate level.

For the period 1998-2001, the Social Research and Demonstration Corporation purchased a portion of Prof. Schwartz's teaching load at Carleton and employed him in a part-time capacity as its Director of Research. In this capacity he led several teams comprising dozens of other researchers working on a variety of demonstration projects to assess the impact of making certain changes in social programs. For example, in one such evaluation the Corporation assessed over a three-year period what would happen if the benefits paid to social assistance recipients in British Columbia and Nova Scotia who took a job were doubled. In another, it assessed how Employment Insurance recipients would react if they were offered 75% of the salary earned in the job from which they had been laid off in order to take a new job. Among the lengthy list of publications set out in Prof. Schwartz's *curriculum vitae* are a number that are described as "technical reports". He advised the Board that these are non-refereed papers that tend to be quite large and to

involve reports to Royal Commissions of government evaluating the results of various government-sponsored projects.

Much of Prof. Schwartz's research has focussed on the area of educational aid, including an examination of default in repaying student loans. His work in this area suggested to him that "default" does not follow the standard economic model premised on the notion that one would always default if to do so were in one's economic best interests. In fact, he discovered that students often repaid their loans when to do so was not in their best economic interests, and that a psychological model does a better job of explaining and predicting when people will default than does an economic model. Similarly, he also conducted a large study aimed at determining the profile of persons declaring personal bankruptcy.

Shelter did not object to Prof. Schwartz being qualified to provide opinion evidence in the area proposed by the Complainant, and the Board ruled that he was so qualified.

Prof. Schwartz described a "credit rating" as an attempt by a credit bureau to use information from a variety of sources to assign to potential borrowers a placement from 0-9 on a numerical scale. A credit rating of 0 would indicate that the person had no credit history. A credit rating of 1 would be the best possible rating, and a rating of 7, 8 or 9 would indicate that the person had some problem with credit. Prof. Schwartz also advised the Board that every credit bureau also reports a potential borrower's "credit score" in addition to his credit rating. A credit score looks at 12 or 15 objective factors such as age, gender, occupation and education and the association between those characteristics and a good or bad payment record. One of the factors looked at is the individual's credit rating. A credit score is reflected as a single number.

Prof. Schwartz testified that he reviewed the relevant published literature and was unable to find any linking the risk of rental default to the absence of a credit rating. Although there is a very clear relationship between a not very good credit rating and

defaults on consumer loans, he stated that there was no logical reason to extrapolate from that and conclude that a bad credit rating would lead to a default on rent. Prof. Schwartz testified that in the area of personal bankruptcy his research indicated that credit bureaus use completely different models to predict bankruptcy (i.e. default) from the one used to generate a credit score, although some of the same factors might be used in each model. It was Prof. Schwartz's opinion that in order to predict who **might default** on rent, one would have to first know the characteristics of those who **had defaulted** on rent in the past. If the profile of a group of persons were such that they had not been rented to in significant numbers, then it would not be possible to predict how likely they were to default. He identified this statistical problem as "reject inference".

Even in the area of commercial credit scoring, Prof. Schwartz testified that so many factors went into its determination that he was unable to conclude that the absence of credit rating was a significant factor at all, and he concluded that it was of "limited importance". Prof. Schwartz explained that one of the difficulties in determining the likelihood that someone with no credit rating will default on a loan results again from "reject inference" and the fact that such persons so rarely qualify for a loan. In other words, it is hard to develop a predictive model of default for a population that has not been loaned to before. Even if such a predictive model could be developed, Prof. Schwartz noted that that model would be predicated on a large population of persons with no credit rating, of whom newcomers might constitute only a very small percentage. As a result, the model could be quite faulty with respect to its ability to predict the likelihood of default by newcomers with no credit rating. Prof. Schwartz further suggested that because economic immigrants to Canada undergo a screening process that predicates their admissibility to the country in part whether they are credit worthy, it is entirely possible that newcomers with no credit rating might pose less risk of loan default than other persons with no credit history.

On cross-examination Prof. Schwartz indicated that only 10% - 20% of defaults in commercial lending transactions can be predicted in any event, and that the bulk of the risk of default is unknown. He agreed with the suggestion of

Shelter's counsel that the more relevant information a lender is able to obtain the better that lender's assessment of the risk of default will be, with the qualification that there is a need to balance the cost of obtaining that information against its utility. Shelter's counsel also asked Prof. Schwartz about the "Five C's" of commercial lending: character; capital; collateral; capacity to pay; and conditions. While he agreed that all five were relevant considerations when a lender was putting money at risk, Prof. Schwartz was unable to comment on whether such information would be useful to acquire in a rental context, based on his understanding that the risk of default and the potential loss in such situations was quite small.

In his re-examination, Prof. Schwartz referred to bankruptcy studies tending to show that housing has a unique value to people, and that they will try to shift around their other assets or take on other forms of debt in order to secure their housing and avoid defaulting on costs associated with it.

On the basis of Prof. Schwartz's evidence, the Board accepts the following assertions set out at the beginning of his report filed with the Board:

- There is no published evidence of a link between the absence of a credit rating and the likelihood of rental default. The belief that such a link exists is probably based on an assumed link between the absence of a credit rating and the likelihood of default on bank loans and other types of consumer credit.
- In the general population of borrowers, there is a link between an overall "credit score" and the likelihood of default on bank loans. Such credit scores are regularly used as part of the credit granting process.
- In the general population of borrowers, the absence of a credit rating is only one factor, and one of only middling importance, among many other factors used to determine an overall credit score.
- There is good reason to believe that a statistical issue known as "reject inference" implies that the relationship between "no credit rating" and consumer credit default observed in the general population of borrowers does not hold for recent immigrants.

THE PARTIES' POSITIONS

With respect to the issue of liability, all parties agreed to be bound by the findings of fact and conclusions of law in *Kearney*. Shelter further stated, as noted above, that it did not dispute the *obiter* statements in *Kearney* respecting the legal consequences of rejecting a tenancy application because the tenant had no credit rating.

Shelter conceded that it had contravened the *Code* when it rejected the Complainant's application for tenancy, and it agreed that an award in respect of general damages was appropriate for that contravention. It did not dispute the Commission's assertion that $5000 would be an appropriate remedy because that was the amount of the general damages awarded to J.L. in *Kearney*. Nor did it dispute the Complainant's assertion that $6000 would be an appropriate remedy, "because *Kearney* was four years ago".

The only real difference between these parties was with respect to the nature of the prospective relief the Board might order, having regard to certain legislative amendments made during the course of the *Kearney* panel's deliberations but not taken account of in the prospective remedial orders made in that case, and the decision in the *Kearney Appeal* which amended those remedial orders. The nature of the parties' disputes in this area are set out fully below under the heading "Analysis".

ANALYSIS

(i) **Shelter's Tenant Selection Criteria**

As noted under the heading, "Adjudicative Facts", there was no dispute that in deciding whether to accept or reject the Complainant's application for tenancy, Shelter considered the following four criteria:

- A rent/income ratio in the neighbourhood of 30%;
- Employment references and history;
- Landlord references and history; and

- Credit history.

(ii) **Legislative Provisions Considered in *Kearney***

At the time of the incidents alleged in the complaints considered in *Kearney*, and at the time that that hearing concluded, the provisions of the *Code* relevant to the assessment of whether Shelter's tenant selection criteria contravened the *Code* were the following:

> 2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance.
>
> 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 10 (1) "equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination.
>
> 11 (1) A right of a person under Part I [sections 1 to 9 inclusive] is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction, or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

(iii) ***Kearney***

In *Kearney*, the Board (differently constituted) found that the application of rent/income ratios constituted unlawful discrimination on the basis of, *inter alia*, citizenship and place of origin. It did not find the consideration of the other kind of criteria that Shelter customarily assesses to be necessarily in contravention of the *Code*, but did suggest that the refusal of an application for tenancy on the basis of no employment, landlord or credit history would contravene the *Code*:

> This Board was asked to consider whether the use of income criteria in assessing tenants for rental housing violated the *Code*. The Commission and the complainants proved in their evidence that income criteria does [sic] not predict default. They also showed that the use of income criteria has a substantial adverse impact on groups protected by the *Code*. The Commission and the complainants at no time asked this Board to find that random allocation of rental housing units is appropriate. Landlords are entitled to seek credit history, rental history, employment status, and use other selection criteria that do not violate the *Code*. Landlords, however, must be mindful that there is a difference between a tenant having no credit rating and a bad credit rating. There is a difference between a poor reference from a previous landlord and no reference. Denying housing to a prospective tenant because the individual has no credit rating, no landlord or employment history, is like denying housing for failing to meet an income criteria [sic] in our view. (at Paragraph 190)

As noted earlier, Shelter agreed in this Complaint to be bound by the findings of the *Kearney* panel with respect to the legal characterization of both the rejection of tenancy applications based on the failure to meet minimum income criteria, as well as its *obiter* comments with respect to rejections premised on a lack of employment, credit or landlord history.

In addition to awarding both general and (where appropriate) specific damages to the individual complainants, *Kearney* also set out the following declarations and prospective remedies applicable to the respondent landlords' future rental practices:

> 1. The Board declares that the use of rent-to-income ratios/minimum income criteria violate sections 2(1), 4, 9 and 11 of the *Human Rights Code* whether used alone or in conjunction with other selection criteria or requirements.
>
> 2. The respondents, Creccal Investments, Shelter Corporation and Bramalea, shall cease and desist from using rent-to-income ratios or minimum income criteria in selecting prospective tenants whether alone or in conjunction with other selection criteria or requirements.

In making the above orders, *Kearney* did not advert to recent amendments to the *Code* (set out in the next section of this decision).

(iv) **Legislative Amendments**

After the hearing had concluded, but prior to the issuance of *Kearney*, the *Code* was amended and a new regulation to it promulgated. As a consequence, the following provisions become relevant to the consideration of the appropriate prospective remedies (if any) that should issue in respect of this Complaint.

Section 21(3) of the *Code* now provides:

> The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed if a landlord uses in the manner prescribed under this Act income information, credit checks, credit references, rental history, guarantees, or other similar business practices which are prescribed in the regulations under this Act in selecting prospective tenants.

O.Reg. 290/98 provides as follows:

> 1(1) A landlord may request credit references and rental history information, or either of them, from a prospective tenant and may request

from a prospective tenant authorization to conduct credit checks on the prospective tenant.

(2) A landlord may consider credit references, rental history information and credit checks obtained pursuant to requests under subsection (1), alone or in any combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.

(3) A landlord may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1).

(4) A landlord may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly only if the landlord considers the income information together with all the other information that was obtained by the landlord pursuant to requests under subsection (1).

(5) If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.

2(1) A landlord may require a prospective tenant to obtain a guarantee for the rent.

(2) A landlord may require a prospective tenant to pay a security deposit in accordance with sections 117 and 118 of the Tenant Protection Act, 1997.

3 In selecting a prospective tenant, a landlord of a rental unit described in paragraph 1, 2 or 3 of subsection 5(1) or subsection 6(1) of the Tenant Protection Act, 1997 may request and use income information about a prospective tenant in order to determine a prospective tenant's eligibility for rent in an amount geared-to-income and, when requesting and using the income information for that purpose only, the landlord is not bound by subsections 1(3) and (4).

4 Nothing in this regulation authorizes a landlord to refuse accommodation to any person because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.

5 This Regulation comes into force on the day clause 48(a.1) of the Act comes into force.

(v) **Subsequent Jurisprudence**

The Board, identically constituted to the panel hearing this Complaint, has had two previous occasions to consider the impact of the legislative amendments on the scope of the prospective remedies it can fashion. On one of those occasions it also considered the effect of the *Kearney Appeal* on this question.

In *VanderSchaaf v. M.R. Property Management Ltd.* (2000), 38 C.H.R.R. D/251 ("*VanderSchaaf*"), the Board considered only the use of a rent/income ratio as a tenant selection criterion. It determined that although the use of that criterion constituted discrimination on the basis of sex, the rejection of the tenancy application in that case resulted, not from the application of such ratio, but rather from the differential assessment criteria applied to co-tenancy applications from room-mates as compared to those from couples. Consequently, the Board concluded that the respondents in that case unlawfully discriminated against the complainant on the basis of marital status. The Board nevertheless went on to offer its *obiter* interpretation of s. 21(3) of the *Code* and O.Reg, 290/98, and to indicate the prospective remedial orders it would have made had it found the necessary causal connection between the use of rent/income ratios and the rejection of the complainant's tenancy application. The analysis of the legislative amendments encompassed several paragraphs of the Board's decision:

> 102. Section 2 is found in Part I of the *Code*, which also contains s. 9, prohibiting persons from "directly or indirectly" infringing "a right under this Part". Although s. 11 is found in Part II of the *Code*, pursuant to it, Part I is infringed where a factor that "is not discrimination on a prohibited ground" results in the exclusion, restriction or preference of a group identified by a prohibited ground of discrimination, except where the factor is reasonable and bona fide and the needs of the group cannot be accommodated without undue hardship". *Kearney* found that the use of rent/income ratios came within the description of behaviour proscribed by s. 11 with the consequence that the use of those ratios contravened the complainants' rights under Part I of the *Code*. In the "Order" portion of its decision, the panel declared that rent/income ratios (used alone or in conjunction with other factors) "violate sections 2(1), 4, 9 and 11 of the *Human Rights Code*, whether used alone or in conjunction with other selection criteria or requirements".

103. Section 21(3) of the *Code* now provides that the *Code*'s guarantee of equal treatment with respect to accommodation is not infringed by a landlord's use of income or other information in accordance with the regulation. Neither the *Code* nor the regulation defines "income information". Section 21(3) appears in Part II of the *Code*, under the heading, "Interpretation and Application". Because s. 21(3) constitutes an exception to the guarantees in the *Code*, it must be construed narrowly.

104. O.Reg. 290/98 provides that a landlord can request and consider "income information" as long as it also requests and considers rental history and credit references. If the latter information is not forthcoming, the landlord can consider income information alone. Section 4 of the regulation expressly states that nothing in it authorizes a landlord to refuse accommodation "because of" various proscribed grounds of discrimination. These proscribed grounds of discrimination are the same as the ones set out in s. 2(1) of the *Code*, and the grammatical structure of s. 4 of O.Reg. 290/98 is identical to that of s. 2(1) of the *Code*.

105. It is difficult to reconcile the amended *Code* and regulations with the decision in *Kearney*, no doubt because the former antedated and anticipated the latter. Both the Commission and the Complainant struggled valiantly to do so.

106. Both the Commission and the Complainant agreed that the term "income information" is broad enough to encompass information about the amount, source, and steadiness of a potential tenant's income. The Commission submits that O.Reg. 290/98 insofar as it allows landlords to consider "income information" permits them to apply rent/income ratios. The Complainant, on the other hand, while conceding that a landlord may obtain information respecting the amount of a potential tenant's income, argues that the landlord is not permitted to apply a rent/income ratio. The question of what meaning to ascribe to "income information" can only be answered having regard to the whole of O.Reg. 290/98. At this point, however, the Board notes that it would have been a simple matter for the legislature to have clearly indicated if it intended to permit landlords to use rent/income ratios by employing that express language in the regulation. The Board also notes that during the Standing Committee on General Government hearings into Bill 96, Government members of the Committee offered repeated assurances that it was not the Government's intention to authorize the use of a 30% rent/income ratio, but that their intention was confined to clarifying what information landlords could request from prospective tenants.

107. The Commission also submits that where landlords receive rental history, credit references and income information, they must consider each type in a meaningful way and may not "use minimum income criteria as an absolute cut-off in the absence of consideration of the other information prescribed in the Regulation, where such information is available". As

well, the Commission submits that there is a distinction between "negative credit references or negative rental history and no credit references or no rental history". Some protected groups may have an absence of such information and the Regulation does not permit a landlord to refuse to rent to a person on the basis that credit references and rental history do not exist. This issue does not arise on the facts of this case, and the Board refrains from comment on this aspect of the interpretation of O.Reg. 290/98.

108. The real difficulty with interpreting O.Reg. 290/98 is determining what meaning to ascribe to s. 4. The Commission submits that this section, read in the context of the *Code* as a whole and *Kearney*, precludes a landlord from refusing to rent "directly because of a prohibited ground". The Board disagrees for several reasons. First, if that had been the legislative intention, it would have been much easier to say so plainly. Second, the Supreme Court of Canada in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears* (1985), 7 C.H.R.R. D/3102 found that a prohibition on discrimination employing the same grammatical structure as that found in s. 2 of the *Code* and s. 4 of O.Reg. 290/98 was not limited to prohibiting direct discrimination only. Rather, it also prohibited adverse effect discrimination. Third, reading s. 4 of O.Reg. 290/98 to prohibit direct discrimination only renders it utterly redundant since s. 2(1) of the *Code* already makes it unlawful to directly discriminate on the basis of a prohibited ground. That protection against direct discrimination is not undermined by permitting the use of rent/income ratios, rental history or credit references, all of which *Kearney* held to be neutral rules or factors that could be applied in a non-discriminatory fashion, but which nevertheless could constitute unlawful discrimination under the *Code* where they resulted in the exclusion, restriction or preference of a group identified by a prohibited ground of discrimination. Fourth, the Supreme Court of Canada in *Meiroin* identified the difficulties associated with analyses of discrimination that rely on the distinctions historically drawn among behaviours described as direct, indirect, constructive, adverse effect or systemic discrimination.

> The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify, simply because there are few cases that can be so neatly characterized. For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either directly discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has an adverse effect on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). On the same reasoning, it could plausibly be

> argued that forcing employees to take a mandatory pregnancy test before commencing employment is a neutral rule because it is facially applied to all members of a workforce and its special effects on women are only incidental. (at Para. 27)

109. In view of all of the above, the Board is reluctant to read s. 4 of O.Reg. 290/98 as creating a distinction between direct and indirect discrimination where the statutory language in question does not absolutely and expressly compel it.

110. The Complainant's representative submitted that s. 4 of O.Reg 290/98 prohibited all discrimination. He argued that its effect was to preserve the outcome in *Kearney*. In his view, O.Reg. 290/98 as a whole allowed landlords to request and use certain information, but required that they do so reasonably, and not in such a way as to contravene the *Code*. Hence his urging that a landlord's "consideration" of income information could not include the application of rent/income ratios, because they had been shown in *Kearney* to have no correlation with risk of default. Despite repeated questioning, he would not concede that any reasonable rent/income ratio could be specified. Although he described the regulation as "circular", the Complainant's agent did not describe it as repugnant to the *Code* and ineffective on that basis.

111. It seems to the Board that there are three possible solutions to the conundrum of how to reconcile the *Code*, *Kearney* and O.Reg. 290/98. The first is to declare that the legislative changes are so hopelessly circular that it is impossible to ascribe meaning to them. On this reading, O.Reg. 290/98 is repugnant to the *Code* and cannot stand. The second possibility is that because the easiest to satisfy rent/income ratio considered in *Kearney* was 34% and it was found to contravene the *Code*, what the amendments and *Kearney* now mean is that landlords are prohibited from applying rent/income ratios of less than 35%, but may apply ratios larger than that, subject to the risk of those ratios being found to contravene the *Code*. The problems with this approach, however, are that the expert evidence here demonstrated that all rent/income ratios disproportionately disadvantage groups of persons identified by prohibited grounds of discrimination, and that the *Kearney* panel appeared to declare that all rent/income ratios contravene the *Code*. The third possibility, and the one I prefer, is to find that permitting landlords to obtain "income information" from prospective tenants does not permit them to apply rent/income ratios, all of which *Kearney* found contravened the *Code*. On balance, therefore, I adopt the Complainant's interpretation of "income information" to that offered by the Commission. I observe, however, that even this interpretation leaves open the possibility that sophisticated landlords may attempt to prefer higher-income applicants without contravening the *Code*, by "eyeballing" the relationship between income and rent, but not actually crunching the numbers.

The *Kearney Appeal, supra*, issued subsequent to the decision in *VanderSchaaf*. In it, the Court dismissed the appeal on the merits of the decision, stating the following with respect to each complaint:

> 36. In my view, there was evidence upon which the Board was entitled to make its finding that, on a balance of probabilities, Bramalea's use of rent/income ratio as the sole basis for refusing her application for accommodation constituted *prima facie* constructive discrimination against Ms. Kearney on the basis of age. Moreover, in my view the Board was justified in finding Bramalea did not, on a balance of probabilities, call evidence to establish any one of the three (3) components of a defence under s. 11 of the Code, namely:
>
> (i) that the requirement was reasonable,
> (ii) *bona fide* in the circumstances, and
> (iii) that ceasing the use of the rent/income ratio would cause undue hardship to the landlords.
>
> [citations omitted]
>
> 37. In my view, there was evidence upon which the Board was entitled to make its finding that, on a balance of probabilities, Shelter's use of an income level/rent to income ratio as the sole basis for refusing her application for accommodation constituted a *prima facie* case of discrimination against Ms. J.L. on the basis of her age and that Shelter had not established, on a balance of probabilities, any one of the three (3) necessary ingredients of a defence under s. 11 of the Code.
>
> 38. In my view, there was evidence upon which the Board was entitled to make its finding, on a balance of probabilities, that Creccal's use of [sic] income/rent ratio as the sole basis for refusing her application for accommodation constituted a *prima facie* case of discrimination against Catarina Luis on the basis of "receipt of public assistance" and that Creccal had not established, on a balance of probabilities, any one of the three (3) necessary ingredients of a defence under s. 11 of the Code.

The appeal was nevertheless allowed in part and the Court replaced two of the *Kearney* remedial orders having prospective effect with a single declaration that the respondents in that case had breached the complainants' rights under the *Code*. The rationale for the Court's substitution of its remedy is set out in the following passages respecting the impact of O.Reg. 290/98:

> If paragraph 1 or paragraph 2 [declaring the use of rent/income ratios to contravene the *Code* and ordering the landlords to cease and desist from using them] of the December 22, 1998 Order of the Board is allowed to stand, the Appellants/landlords would be forever prohibited by paragraphs 1 and 2 from utilizing the new s. 21(3) of the *Code* and/or O.Reg. 290/98, entitled: "Business Practices Permissible to Landlords in Selecting Prospective Tenants for Residential Accommodation".
>
> If paragraph 1 and paragraph 2 of the impugned Order are allowed to stand, because of the June 17, 1998 amendments, the Appellants/landlords would be bound, in perpetuity, by a different set of rules than every other landlord in Ontario.
>
> On several occasions during their submissions, counsel for the Respondents reminded us that the *Code* was remedial and not punitive. That proposition alone points out why those paragraphs cannot be allowed to stand.

In *Sinclair and Newby v. Morris A. Hunter Investments Ltd. and Larry McGrath,* [2001] O.H.R.B.I.D. No. 24 (Q.L.) ("*Sinclair*"), the Board quoted the above passage from the *Kearney Appeal*, and then commented as follows:

> The above passages represent the totality of the Divisional Court's comments with respect to the legislative amendments. The Court did not engage in any analysis of how the provisions of O.Reg. 290/98 might be interpreted and applied. Instead, without engaging in that analytical exercise, the Court appears to have premised its orders on the assumption that O.Reg. 290/98 functioned to permit the use of rent/income ratios. The regulation on its face, however, only refers to "income information", and only purports to permit landlords to ask for and rely on such information in restricted circumstances. While the Board is bound to follow the decisions of the Divisional Court, in the absence of the Court's engaging in any close examination of the implications of O.Reg. 290/98, and with the Board's own analysis in *VanderSchaaf* suggesting that O.Reg. 290/98 does not permit the use of rent/income ratios, the Board finds that O.Reg. 290/98 and the *Kearney Appeal* do not preclude it from making a cease and desist order. The Board is of the view that such an order would generally be appropriate for the following reasons.
>
> Rent/income ratios have been found to constitute discrimination on 8 of the 14 grounds prohibited in subsection 2(1) of the *Code*. The *Code* protects those who are susceptible of being socially disadvantaged because of particular personal attributes. *Kearney* and *VanderSchaaf* recognize

the fact that social disadvantage is frequently accompanied by economic or financial disadvantage. It is entirely possible that an evidentiary basis may also exist for concluding that rent/income ratios which prefer the economically advantaged would also be found to discriminate on other grounds prohibited under the *Code*, such as ancestry, colour, ethnic origin or handicap. Rent/income ratios have already been found and are likely to be found to be discriminatory in respect of their application to such a wide range of potential tenants that it would be difficult to think of circumstances in which they could be employed without contravening the *Code*.

Board of Inquiry decisions are not made *in rem*. They have no precedental authority and are not binding upon persons who are not party to them. Nevertheless they must be regarded as having significant persuasive authority. In this case involving an issue of access to accommodation and the use of a rule that restricts that access, it is difficult to conceive of a way in which an applicant for rental housing can be accommodated under the *Code* short of elimination of the access criteria. The situation before the Board does not involve a subsisting relationship between the complainant and the respondent, rather it pertains to the opportunity to commence a relationship. Human rights jurisprudence frequently states that members of protected groups who are differentially and disadvantageously impacted by apparently neutral rules of general application must make known their need for accommodation. That proposition is of very doubtful application to this type of situation where it is simply not meaningful to look at individual accommodation, and where the very existence of the rental criteria may have a chilling effect on applications from members of identified groups. The only accommodation possible is to forego use of the rent/income ratio at all in the assessment of many applicants for tenancy. The remedial orders in *Kearney* recognize this fact. Implicitly, so too does the Supreme Court of Canada's analysis in British Columbia *(Public Service Employee Relations Commission) v. B.C.G.S.E.U.* (1996), 176 D.L.R. (4th) 1 ("*Meiorin*"), although since that case arose as a grievance following a termination of employment rather than as a proceeding under human rights legislation, we do not have the benefit of the Court's pronouncement on what an appropriate remedy under human rights legislation might be.

Based on *Kearney* and *Meiorin*, and this Board's unchallenged interpretation of O. Reg. 290/98 in *VanderSchaaf*, all landlords, regardless of whether they were parties to and bound by those decisions, would be wise to consider carefully indeed whether to continue using rent/income ratios as a means of screening tenants. While using rent/income ratios would not render them susceptible of an enforcement application or contempt proceedings pursuant to decisions to which they were not a party, such practices would render them susceptible to further human

> rights complaints, in which, in the absence of any further legislative reform, an order to cease and desist using such ratios could well issue should the Board follow its own jurisprudence to date. Certainly in the circumstances of this case such an order would be appropriate.
>
> With respect to rental practices requiring tenants to satisfy minimum job tenure criteria, the Board notes that O. Reg. 290/98 addresses itself to landlords' use of "income information". It does not expressly purport to apply to "employment information". In the absence of such express language, the Board is not prepared to find that O.Reg. 290/98 has any application in permitting the collection of and reliance on information respecting the status and tenure of a potential tenant's employment. Nor does any provision in the *Code* purport to permit the collection of such information. Consequently, an appropriate order in respect of this practice would have been to order landlords to cease and desist from requiring potential tenants to meet minimum job tenure criteria.

With the exception of the initial conference call and some ensuing correspondence, the respondent landlord in *VanderSchaaf, supra,* did not participate in the hearing, and did not make any submissions with respect to the interpretation of O.Reg. 290/98. In *Sinclair, supra*, the Board found that the Complaint failed to name the respondent landlord as a party. Consequently, that landlord did not participate in the hearing or make any submissions with respect to O.Reg. 290/98. The personal respondent and the principal of one of the corporate entities constituting the landlord participated in some portions of the hearing in *Sinclair, supra,* and absented themselves from the hearing on other occasions. Their participation did not include cross-examining the expert witnesses called by the Commission and complainants, calling any expert witnesses of their own, or offering the Board any submissions with respect to how O.Reg. 290/98 should be interpreted.

(vi) **The Parties' Submissions**

All of the parties in this case agreed that the circumstances in which the Board's jurisprudence in this area has developed are indeed unfortunate. In particular they noted the following facts:

- that the legislative amendments were made prior to the release of the decision in *Kearney*, at a point when it was perhaps not yet entirely clear what "mischief" the provisions of O.Reg. 290/98 were intended to redress;
- that *Kearney* itself offered no comment on O.Reg. 290/98;
- that subsequent to *Kearney*, the Board dealing with these issues in *VanderSchaaf*, *Sinclair*, and in this case has been identically constituted;
- that the Board received no submissions from the respondent landlords in *VanderSchaaf* and *Sinclair* with respect to the interpretation of O.Reg. 290/98;
- that O.Reg. 290/98 and the Board's analysis of it in *VanderSchaaf* were not fully argued before the court that issued the *Kearney Appeal*;
- that the *Kearney Appeal* does not contain a fuller articulation of the reasons why it was felt that that the prospective remedial orders in *Kearney* were incompatible with O.Reg. 290/98; and
- that having been partially victorious in the *Kearney Appeal*, Shelter nevertheless finds itself back before the Board on the issue of the propriety of its continued use of certain tenant selection criteria.

The Board joins with the parties in viewing the above circumstances as extremely unfortunate ones that complicate the adjudication of these matters and have made it difficult for the parties to ascertain exactly what the state of the law is without resort to such adjudication. At the same time, the Board wishes to commend all the parties, but particularly, shelter, for the degree of cooperation shown with respect to the adjudication of this Complaint.

The Commission and the Complainant took the position that a clear case of *prima facie* discrimination against the Complainant had been established. The Complainant was a Bangladeshi citizen and a newcomer to Canada who had arrived in the country as a

landed immigrant only six weeks before applying to Shelter for an apartment and having that application refused for its failure to satisfy any of Shelter's four tenant selection criteria. In the Commission's submission, the use of any of those criteria to assess the tenancy applications of newcomers contravened the *Code*. It was argued that the Board must find that the rent/income ratio constituted a contravention of the *Code*, because the *Kearney* panel had so found, and the Divisional Court had dismissed an appeal on that finding. With respect to the rejection of the Complainant's rental application because he had no credit or landlord history, and insufficient employment history, the Commission and the Complainant submitted that it was self-evident that a newcomer to Canada would be disadvantaged by a rule or guideline permitting his tenancy application to be rejected on such a basis where the history in question must be history in Canada. They further submitted that there was no evidence tending to suggest that an applicant with a lack of credit history was more likely to default on his/her rent. Finally, the Commission and the Complainant noted that Shelter had failed to adduce any evidence to establish the elements of a defence under section 11 of the *Code*.

With respect to the interpretation of O.Reg. 290/98 and the availability of prospective remedies, the Commission advised the Board that it was seeking an order that Shelter cease and desist from applying rental, credit and employment history criteria to deny accommodation to newcomers to Canada who lack such history. The Commission further advised that it was not seeking any prospective remedy with respect to Shelter's use of a rent/income ratio on the basis that that issue had already been litigated with Shelter.

The Complainant's counsel argued that the use of minimum income criteria, whether applied rigidly or in a flexible manner, and whether it was the sole factor considered or one of several, had been found in *Kearney* to contravene the *Code*, and that nothing in the *Kearney Appeal* disturbed this finding. Counsel also submitted that paragraphs 36, 37 and 38 from the *Kearney Appeal* (reproduced above) appeared to suggest that the *Code* and O.Reg. 290/98 would be violated if an application were rejected solely on the basis of income information, but that it is not clear how this

conclusion might be affected by a situation where other information is not requested, or requested but not obtained, or requested and obtained but not considered. The Complainant noted that in *Kearney* it was found that Shelter refused the application of the complainant J.L. on the basis of both her lack of credit history as well as her failure to satisfy a minimum rent/income ratio, and from this concluded that that the Divisional Court's dismissal of the appeal with respect to liability meant that it concluded that the rejection of a rental application based on the prospective tenant's lack of credit history and failure to satisfy income criteria contravened the *Code* and O.Reg. 290/98. Counsel stated that the Court in the *Kearney Appeal* "can only be assumed to have agreed with *Kearney* that absence of credit history is not a valid reason for refusing a tenancy application, and in the absence of a valid reason, a rejection on the basis of income information was inconsistent with O.Reg. 290/98 and the *Code*." The Complainant submitted that the Board should issue orders that Shelter cease and desist from: using minimum income criteria to disqualify newcomers who seek to become its tenants; requiring that applicants satisfy minimum job tenure requirements; considering the lack of credit history as a negative factor in the assessment of applications for tenancy; and considering the absence of references from a Canadian landlord as a negative factor in accepting applications for tenancy.

Shelter argued that the Divisional Court's emphasis on the words "sole factor" in paragraphs 36-38 of the *Kearney Appeal* is extremely important, and that this language, coupled with the striking down of the prospective remedial orders in *Kearney*, suggests that the Court was of the view that landlords are now permitted to use rent/income ratios in conjunction with other factors in the selection of tenants. What landlords are not permitted to do, in the submission of Shelter's counsel, is to deny a tenancy on the basis of income information alone without asking for credit and rental history information. In counsel's submission, O.Reg. 290/98 contemplates the situation where requested information simply may not exist. In those situations, so long as the request for the information has been made, the landlord may deny a tenancy based on the income information.

(vii) **The Board's Reasons**

The Board notes that this Complaint was filed in 1989, prior to the amendment of section 21 of the *Code* and the promulgation of O.Reg. 290/98. Neither subsection 21(3) nor O.Reg. 290/98 were declared to operate retrospectively. Accordingly, the Board must consider the pre-amendment *Code* provisions in determining whether there has been a contravention. This is the same version of the *Code* considered in *Kearney*.

The Board finds that Shelter's tenant selection policy, which requires prospective tenants to have good landlord and credit history, and to satisfy minimum income and job tenure criteria, disadvantages newcomers to Canada, a group identified by the facts that neither its "citizenship" or "place of origin" are Canadian. Section 2 of the *Code* prohibits discriminating against persons in accommodation on the basis of "citizenship" or "place of origin" and Shelter's rejection of the Complainant's tenancy application based on its tenant selection criteria thus constitutes a *prima facie* contravention of subsection 11(1) of the *Code*. Shelter adduced no evidence to establish that these rental practices were reasonable and *bona fide* and that their inapplicability to newcomer tenants would occasion undue hardship to it. Nor could such findings be supported by the evidence of the experts proffered by the Commission and Complainant.

Accordingly, the Board concludes that Shelter contravened the *Code* when it denied the Complainant's tenancy application on the basis that his income level was unsatisfactory, and that he lacked any credit, landlord, or employment history in Canada.

With respect to the issue of the availability of prospective remedies, the Board must consider the extent to which it is constrained by the provisions of subsection 21(3) and O.Reg. 290/98, and the Divisional Court's decision in the *Kearney Appeal*. Essentially, the Board must determine whether Shelter's tenant selection policy continues to contravene the amended *Code* and O.Reg. 290/98 insofar as it is applied to newcomers. As detailed above, the submissions of the Complainant and Shelter focussed, not so much on the language of O.Reg. 290/98, as on what the Board ought to infer about its

application from certain comments in the *Kearney Appeal*. The difficulty with doing so, of course, is that the Court did not expressly turn its mind to the impact of O.Reg. 290/98 on the use of rent/income ratios alone or in conjunction with other factors.

The Complainant's submissions suggest that because the Court did not interfere with the *Kearney* finding that J.L.'s application for tenancy was refused by Shelter both for her failure to satisfy minimum income criteria and her lack of any credit references, the Board ought to conclude that it viewed the consideration of those two factors in combination as inconsistent with the *Code* and O.Reg. 290/98. The Board rejects this inference on the basis that it appears to be premised on the Court's giving retrospective effect to O.Reg. 290/98 and considering it relevant to the issues of liability in *Kearney*. For the reasons already indicated, in the Board's view it is not appropriate to give retrospective effect to O.Reg. 290/98, and it is not appropriate to conclude that the Court did so in the absence of an express statement to that effect.

The Board is also reluctant to accede to Shelter's request that it draw the inferences it suggests from the language of paragraphs 36 to 38 of the *Kearney Appeal*. There are two reasons for the Board's reluctance to do so. First, it appears to the Board that the Court in these paragraphs is merely purporting to summarize the findings in *Kearney*, rather than attempting to indicate anything about its own view of O.Reg. 290/98, which it does not even begin to address until paragraph 49. Second, the Board is not confident that paragraphs 36 to 38 are drafted with sufficient precision to withstand such close parsing. For example, each of those paragraphs finds that the *Kearney* Board had sufficient evidence before it to find that rent/income ratios discriminated against the complainants on the basis of the prohibited grounds of, *inter alia*, age and "receipt of public assistance". In fact, however, in *Kearney* it was found that rent/income ratios also discriminated on the basis of several other prohibited grounds: race, sex, marital status, family status, citizenship, and place of origin. The Court simply does not comment on those findings. Since they are not overturned, they are presumably upheld, but that is not clear from paragraphs 36 to 38. More significantly, in *Kearney*, the Board noted that a factor in the rejection of the complainant J.L.'s application for tenancy was the fact that

she had no credit history, and it equated the denial of a tenancy premised on no credit information to a denial based on the application of rent/income criteria. Furthermore, the *Kearney* prospective order directed the respondent landlords to cease and desist from using rent/income ratios "alone or in conjunction with other selection criteria". The *Kearney Appeal* does not advert to these comments in *Kearney*, although it surely would have done so if it had intended the word "solely" in paragraphs 36 to 38 to bear the weight suggested by Shelter.

The Board therefore rejects the suggestion that the interpretation of O.Reg. 290/98 is assisted by anything in the *Kearney Appeal* other than those passages that purported expressly to address it. Those passages, reproduced above, clearly indicate that the Court was only concerned to ensure that the respondent landlords in that case were not "bound ... by a different set of rules than every other landlord in Ontario". As the Board found in *Sinclair*, *supra*, the *Kearney Appeal* offers no real guidance as to how O.Reg. 290/98 should be applied.

Looking at the language of O.Reg. 290/98 itself, then, Shelter suggests that it clearly provides that so long as landlords request credit or rental history information from prospective tenants, they may also request income information. A landlord who does so is required by subsection 1(4) to consider all the information so obtained. Subsection 1(5) then provides that if only income information is forthcoming, the landlord may select or refuse the tenant based on that information alone. Shelter suggests that that is exactly what occurred with respect to the Complainant's tenancy application, and that if Shelter were to do the same today, its decision would constitute an acceptable business practice under section 21(3) of the *Code* and O.Reg. 290/98, and would not constitute an infringement of section 2 of the *Code*.

In the Board's view, there are two problems with Shelter's proposition. The first problem relates to definitional gaps in section 1 of O.Reg. 290/98. What is "income information", and does permitting the consideration of "income information" necessarily mean that the application of rent/income criteria is permissible? What does it mean to

say "if ... a landlord only obtains income information"? Does that encompass only the situation where an applicant refuses to provide or authorize the collection of the information about credit or rental history, or does it also encompass the situation where the information obtained is that the applicant simply has no such history? It appears clear to the Board that if the latter is permissible it will likely disadvantage rental applicants on the basis of a number of prohibited grounds of discrimination, including age, citizenship and place of origin. Most significantly, however, Shelter's proposition effectively reads section 4 out of O.Reg. 29/98. The effect of Shelter's submission is that rental criteria which demonstrably disadvantage groups identified by prohibited grounds of discrimination and which have not individually been justified as reasonable and bona fide, are acceptable when used in conjunction with other such criteria. Such result appears to the Board to be frankly absurd. Consequently, notwithstanding the submissions of counsel, the Board remains convinced that its interpretation of the interplay between sections 2, 9, 11 and 21 of the *Code* and O.Reg. 290/98 first enunciated in *VanderSchaaf*, *supra*, and reproduced above, offers the only meaningful way of reconciling these somewhat circular provisions.

ORDER

The Respondent Shelter is ordered to pay to the Complainant the sum of five thousand dollars ($5000.00) in general damages for the breach of his right to be free from discrimination.

If the above amount is not paid within 30 days of the date of this decision, it will attract post-judgment interest calculated in accordance with the *Courts of Justice Act*.

The Respondent Shelter is ordered to cease and desist from rejecting applications for tenancy by newcomers to Canada in any of the following circumstances:

(1) where such applicants have no credit, employment or rental history in Canada;

(2) where such applicants fail to meet minimum job tenure criteria; or

(3) where such applicants fail to meet minimum income criteria.

Nothing in this Order precludes Shelter from rejecting an application for tenancy from a newcomer or any other applicant who refuses to provide or authorize the collection of credit information or rental history. Nothing in this Order precludes Shelter from rejecting an application for tenancy from a newcomer or any other applicant in respect of whom credit or rental history is forthcoming and is unsatisfactory.

Dated at Toronto, this 2nd day of May, 2002.

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Mary Anne McKellar, Vice-Chair